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MEMORANDUM

DATE: June 10, 2019

TO: Sonoma County Board of Supervisors

CC: Sonoma County Sheriff

FROM: Office of the Sonoma County Counsel

RE: Bohemian Grove Agreement for Supplemental Law Enforcement Services

CONFIDENTIAL COMMUNICATION
ATTORNEY WORK PRODUCT &
ATTORNEY-CLIENT PRIVILEGE*

*Attorney Client Privilege waived by a
vote of the Sonoma County Board of
Supervisors on June 11th, 2019

ISSUE PRESENTED

Question:

Can the County of Sonoma legally enter into an agreement for supplemental law enforcement services with a private, male-only membership club, such as the Bohemian Club?

Short Answer:

Yes. The County may legally enter into an agreement with the Bohemian Club to provide supplement law enforcement services at the club's annual encampment event in Sonoma County, even though women are excluded from the Club's membership.

ANALYSIS

1. Factual Background

The Bohemian Club is a private member-based club located in San Francisco. Membership is limited to men only. The club hosts an annual two-week long summer encampment at Bohemian Grove in Sonoma County. The Bohemian Club has requested that the Sonoma County Sheriff's Office provide supplemental law enforcement services for the encampment in July 2019, and has agreed to reimburse the County for direct staff and vehicle costs in an estimated amount of \$151,127.

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On June 4, 2019, the agreement for supplemental law enforcement services came before your Board for approval. During public meeting, your Board voiced concerns about the exclusion of women from the club's membership, and requested a legal opinion from County Counsel whether the County can legally contract with the Bohemian Club based on gender equality questions.

The short answer is: yes, based on the following analysis.

2. Public Accommodations & Gender Equality

Federal and state law provide a number of broad protections against gender discrimination in a variety of situations, such as in employment¹ and educational settings. These protections are more limited in the context of public accommodations, however, such as access to businesses and private establishments.

The Federal Civil Rights Act of 1964, for example, currently does not contain a provision prohibiting discrimination based on gender with respect to public accommodations.² It prohibits discrimination on the grounds of "race, color, religion or national origin," but currently does not include sex or gender. It also creates an exception for "private clubs,"³ as Congress' intent was to provide a remedy only for discrimination occurring in facilities or establishments serving the public.⁴ This exception is rooted in the First Amendment's freedom of association which includes the right of private individuals and entities to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.⁵ Freedom of association also extends a freedom *not to* associate, allowing private clubs with exclusive memberships.

California's Unruh Civil Rights Act is broader and protects all persons - no matter their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status - with respect to full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind.⁶ In addition, classifications based on sex are considered "suspect" for purposes of equal protection analysis under the California Constitution,⁷ and public policy in California mandates the equal treatment of men and women. Yet, like the Federal Civil Rights Act, the Unruh Civil Rights Act does not apply to

¹ The County's agreement with the Bohemian Club contains a nondiscrimination clause for employment, which would prohibit the County to contract with a service recipient who discriminates against employees based on gender. Based on the facts known to the County, this is not an issue currently before the Board since the Bohemian Club employs women, and the County is not aware of any evidence indicating a breach of this contract term. The Club also states that they are in compliance with Court orders following a finding of employment discrimination based on gender from the 1980's. (*See Bohemian Club v. Fair Employment & Housing Com.*, (1986) 187 Cal.App.3d 1, 484 U.S. 805.) The Board's stated concern is primarily based on the Club's exclusion of women as members of the Club.

² 42 USC § 2000a.

³ 42 USC § 2000a(e).

⁴ *Clegg v. Cult Awareness Network* (9th Circuit 1994) 18 F.3d 752, 755.

⁵ *NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 907-909, 932-933; *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 617; *Cornelius v. Benevolent Protective Order of Elks*, (Conn. 1974) 382 F. Supp. 1182, 1200.

⁶ California Civil Code § 51.

⁷ *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 20.

the membership decisions of a private club.⁸ Whether or not an organization is, in fact, a private club versus a business establishment within the reach of the Civil Rights Act depends on a variety of factors.⁹ For example, a private establishment that is selective in the admission of its members, that closely controls the governance of the organization (and particularly the selection of new members), that excludes nonmembers from using club facilities, and serves primarily social purposes¹⁰, is more likely considered a “private club,” than a more open and accessible establishment with businesslike attributes, such as the Rotary Club for example. The former can limit its membership based on gender outside the reach of the Civil Rights Act, the latter cannot.¹¹

For purposes of answering the question posed by your Board, the issue of whether or not the Bohemian Club is a private club for purposes of public accommodations, is not determinative. *Even if* the Club was considered a business establishment (and not a private club), the County is not prohibited from contracting with it for law enforcement services.

3. County Authority to Contract & Sheriff Duties

The County generally has very broad authority in contracting matters. California Government Code (Gov’t Code) § 23004(c). In addition, the County’s authority to contract with a private club or business establishment to provide supplemental law enforcement services for special events is specifically provided in Gov’t Code § 53069.8. This Code section provides:

(a)The board of supervisors of any county may contract on behalf of the sheriff of that county, and the legislative body of any city may contract on behalf of the chief of police of that city, to provide supplemental law enforcement services to:

(1)Private individuals or private entities to preserve the peace at special events or occurrences that happen on an occasional basis.

....

(b)Contracts entered into pursuant to this section shall provide for full reimbursement to the county or city of the actual costs of providing those services, as determined by the county auditor or auditor-controller, or by the city, as the case may be.

⁸ *Warfield v. Peninsula Golf & Country Club*, (1995) 10 Cal.4th 594, 631 (“the provisions of section 51 do not apply to membership decisions of a truly private social club.”)

⁹ *Warfield v. Peninsula Golf & Country Club*, (1995) 10 Cal.4th 594, 620.

¹⁰ *Id.*

¹¹ County Counsel provides no opinion about the legal status of the Bohemian Club, but simply notes that it is generally considered a private club that restricts its membership based on gender. See, e.g., *Reesink v. Comm’r* (2012), 2012 Tax Ct. Memo LEXIS 117, *3, Fn. 5.

(e) A contract entered into pursuant to this section shall encompass only law enforcement duties and not services authorized to be provided by a private patrol operator, as defined in Section 7582.1 of the Business and Professions Code.

(f) Contracting for law enforcement services, as authorized by this section, shall not reduce the normal and regular ongoing service that the county, agency of the county, or city otherwise would provide.

* * *

A County Sheriff's statutory duty is to preserve the peace, respond to, and investigate public offenses on both public and private places within his or her jurisdiction.¹² This is a fundamental and legally mandated responsibility of the Sheriff's Office, which cannot be delegated.¹³

Occasionally, special events held by private individuals or entities may demand extra law enforcement services to preserve the peace. In order to forestall breaches of the peace at special events or occurrences, rather than respond after an offense has already occurred,¹⁴ and to effectively and efficiently expend department resources, the Legislature enacted Gov't Code § 53069.8. This law allows a County, on behalf of the Sheriff, to enter into agreements for supplemental law enforcement services at special events and provides a mechanism for cost recovery. Pursuant to Gov't Code § 53069.8(b), contracts shall provide for full reimbursement of the actual costs of providing those services. In essence, these contracts enable the Sheriff to determine how much of the department's resources may be expended ahead of time without reducing the normal and regular ongoing services. Otherwise, unplanned contingencies would not allow the Sheriff to allocate his resources in the orderly manner contemplated by the statute.¹⁵

This legislative policy underlying Gov't Code § 53069.8 does not change based on whether the service recipient is a private club or business establishment for purposes of public accommodations within the reach of the Civil Rights Act.

While the County is prohibited from entering into unlawful or discriminatory contracts,¹⁶ the fact that the Club excludes women from its membership, alone, does not void the County's legal authority to contract for supplemental law enforcement services for a special event.¹⁷ The County is not procuring or offering public services based on gender preference. It is also not sanctioning or

¹² 82 Ops.Cal.Atty.Gen 110, 115 (1999), Gov. Code, § 26600 et.seq..

¹³ 57 Ops.Cal.Atty.Gen. 423 (1974) [county service area district may not be established to provide services already included in mandated basic and uniform level of law enforcement services the sheriff is under obligation to provide]; see also 68 Ops.Cal.Atty.Gen. 175, 181 (1985).

¹⁴ 82 Ops.Cal.Atty.Gen 110, 118 (1999).

¹⁵ 82 Ops.Cal.Atty.Gen 110, 118 (1999).

¹⁶ Civil Code § 1667, Cal. Constitution Art. 1, § 31.

¹⁷ In determining whether a contract violates public policy, courts essentially engage in a weighing process, balancing the interests of enforcing the contract with those interests against enforcement. *Rosen v. State Farm General Ins. Co.* (2003) 30 Cal. 4th 1070, 1082, citing *Bovard v. Am. Horse Enters.*, (1988) 201 Cal. App. 3d 832, 840 (Courts have been cautious in applying public policy reasons to nullify otherwise enforceable contracts. Before labeling a contract as being contrary to public policy, courts must carefully inquire into the nature of the conduct, the extent of public harm which may be involved, and the moral quality of the conduct of the parties in light of the prevailing standards of the community.)

endorsing the Club's policies. Rather, the law enforcement services provided by the Sheriff's Office are statutorily mandated regardless of the Club's membership status, and distinct and separate from the Club's internal policies. Sheriff's Deputies are not providing private security functions for the Club, but are simply enforcing the law. The terms of the agreement and the services provided by the County, comply with express provisions of the law, and are supported by legislative policy considerations promoting public safety and recovery of public funds pursuant to Gov't Code § 53069.8.¹⁸

Based on these legal and public policy considerations, no legal prohibition exists to contract with the Bohemian Club to provide supplemental law enforcement services for its annual encampment event pursuant to Gov't Code § 53069.8.

4. The County's Agreement with the Bohemian Club

Based on the statutory authority provided in Gov't Code § 53069.8, the Bohemian Club has requested that the Sonoma County Sheriff's Office provide supplemental law enforcement services for the Club's encampment in July 2019. The Club has agreed to reimburse the County for direct staff and vehicle costs in an estimated amount of \$151,127. According to the Sheriff's Office this would allow for 100% reimbursement of cost for Sheriff Deputies plus a percentage of the overhead based on rates approved by the Board in the annual fee schedule. It would allow the Sheriff to appropriately allocate resources preemptively without the need to deprive law enforcement resources away from neighboring west county communities such as Guerneville, especially during busy summer weekends along the Russian River. This promotes overall public safety. Without the agreement, the Sheriff would incur unreimbursed staff and overtime costs for extra Sheriff's Deputies needed to respond to additional calls for service within its jurisdiction.

Importantly, these supplemental services only relate to law enforcement duties to enforce and investigate public offense. It does not include services authorized to be provided by private patrol operators.¹⁹ Sheriff's Deputies are not providing private security services, which are provided internally by the Club. Rather, law enforcement services are focused to promote overall public safety in the vicinity of the encampment. Since the authority is limited to enforce *public laws* only, the agreement does not extend to the enforcement of the Club's private rules or policies.

To clarify this point further, County Counsel is suggesting a modification to Section 8 of the agreement as it was presented to your Board on June 5, 2019. Section 8 authorizes the Sheriff's Office to enforce trespass laws under California Penal Code §§ 602 and 602.1, which are public offenses. In this context (enforcement of trespass laws), Section 8(a) stated that the Sheriff's Office is authorized to act as agents for Bohemian Grove when enforcing their rules and policies, and when enforcing Penal Code § 602. The reference to the Club's rules and policies was meant to relate to trespass rules on the Club's encampment grounds but, to remove any ambiguity, it is suggested that the language be deleted from Section 8. An Amended Agreement with this change is presented to your Board for consideration as an option.

¹⁸ The County provides supplemental law enforcement services to other private organizations for special events if warranted from a public safety perspective and Gov't Code § 53069.8. The contract terms are the same.

¹⁹ Gov. Code, § 53069.8(e).

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CONCLUSION

Based on the foregoing constitutional and statutory analysis, it is the legal conclusion of the Sonoma County Counsel that the County, at the Board's discretion, may legally enter into an agreement with the Bohemian Club to provide supplemental law enforcement services at the Club's annual encampment event in Sonoma County.

The proposed modified agreement clarifies that the Sheriff's authority pursuant to Gov't Code § 53069.8 only includes the provision of supplemental services related to law enforcement duties to enforce and investigate public offense. The Agreement does not endorse or enforce the Club's membership policy.

A handwritten signature in blue ink, appearing to read "Bruce Goldstein", is written over a horizontal line.

Bruce Goldstein
County Counsel